# DUE PROCESS OF LAW AND THE POWER OF THE LEGISLATURE TO COMPEL A MUNICIPAL CORPORATION TO LEVY A TAX OR INCUR DEBT FOR A STRICTLY LOCAL PURPOSE.[1]

In the United States municipal corporations are everywhere and at all times required by the State to perform numerous functions which, in the theory of the law at least, are regarded primarily as state functions. Thus the enforcement within any city of state-wide laws governing the preservation of the peace, the prevention or restraint of vice, the promotion of health and sanitation, the establishment and maintenance of public schools, is usually largely in the hands of municipal authorities. So also are not infrequently the conduct of general elections and the collection of state taxes. So also is the care of the streets, which are commonly held to be part of the highways of the State.

Now except in rare instances[2] it is the municipality that bears the entire cost of supporting the various services and institutions which it maintains in its capacity as a so-called agency of the State. In other words, our system of state administration contains large elements of decentralization; and one of these elements is that the local corporation bears the financial burden of carrying on certain functions of the State within its jurisdiction.[3] It is true that the city often enjoys under the law a considerable freedom in determining the amount which it will expend upon a service or institution maintained in its agency capacity; but in respect to such matters there are likewise many mandatory requirements of the law.

So long has this practice prevailed of requiring local corporations to enforce state laws at their own expense, and so thoroughly is it woven into the fabric of our administrative system, that municipal corporations have rarely attempted to oppose the authority of the legislature in this regard, even where the expenditures required to be made have been of a specific and

[1]The substance of this paper will be incorporated in a forthcoming work by the author dealing with the whole problem of the legal relation between the city and the State.

[2]Such, for example, as where the State pays a portion of the cost of maintaining schools.

[3]Goodnow, Municipal Home Rule, 103.

mandatory character. For this reason the books do not hold many cases in which arguments have been advanced in support of a rule of law asserting the competence of the legislature to impose a debt upon a local corporation for a purpose that is regarded primarily as a matter of state, rather than of local, concern. There are a number of cases of record which have involved the right of the legislature to impose upon a local corporation the duty of giving financial support to an undertaking that lay wholly or partly outside the geographical limits of the corporation, or to require one local corporation to incur debts or make expenditures in the interest of another corporation where the two were partly or wholly coincident as to territory.[4] In such cases the courts have sometimes been drawn fairly near to a consideration of the broad question of authority in the legislature to require local corporations to finance administrative services carried on by them in the interest of the State; but for the most part, in these cases, this general authority, supported by extensive practice time out of mind, has been fully and freely conceded without argument.

It is only in one or two cases that the question of the constitutional basis of this legislative power has been squarely presented to the courts for consideration. Thus, in the Oregon case of *Simon* v. *Northup*[5] the court was asked to declare a statute void upon the ground that it was incompetent for the legislature to compel the city of Portland to incur a debt for the construction of public bridges within its boundaries. On this point the court declared:[6]

"It seems to be substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to

[4]See, for example, Kirby *v.* Shaw (1852) 19 Pa. St. 258; Nashville *v.* Towns (Tenn. 1857) 5 Sneed, 186; State *v.* St. Louis County Court (1864) 34 Mo. 546; Sangamon County *v.* Springfield (1872) 63 Ill. 66; Callam *v.* Saginaw (1883) 50 Mich. 7; State *v.* Board of Education (1897) 141 Mo. 45; Thomas *v.* Leland (N. Y. 1840) 24 Wend. 65; Philadelphia *v.* Field (1868) 58 Pa. St. 320; People *v.* Kelly (N. Y. 1879) 5 Abbot's N. C. 383; State *v.* Williams (1896) 68 Conn. 131; Williams *v.* Eggleston (1897) 170 U. S. 304; Carter *v.* Cambridge & Brookline Bridge Proprietors (1870) 104 Mass. 236; Talbot County *v.* Queen Anne's County (1878) 50 Md. 245.

[5](1895) 27 Ore. 487.

[6]p. 495.

compel it to perform such duty and incur a debt therefor. That the making and establishment of public highways and bridges, and the assessment and collection of taxes, are within the legitimate legislative powers, and are among the ordinary subjects of legislation, cannot be questioned. Nor do we think it can be successfully denied that the bridges and ferries referred to in the act under consideration will, when acquired, belong to the City of Portland in its public or governmental capacity; and that in the acquisition of them it is but discharging a public or state duty which it is entirely proper for the legislature to impose upon it."

Again, in the Massachusetts case of *Prince* v. *Crocker*[7] the court was asked to declare invalid a law authorizing the construction of a subway in Boston at the expense of the city. The law required the approval of the undertaking by a vote of the people, but the court was urged to void the law on the somewhat absurd ground that the consent of the city council was not also required. The court answered this objection by declaring that the legislature might have imposed such a financial obligation upon the city without any local consent at all. The opinion recited in this connection:[8]

"It has, however, been established, by a great weight of usage and authority, that the Legislature may impose such a duty and burden upon towns and cities without their own consent. We do not deem it necessary to go into an extended discussion of this subject, or to consider what objects may be so special or local in their character as not to come within the general rule. As to roads of all kinds, and bridges and sewers, the doctrine is well established, in this Commonwealth and elsewhere, that the Legislature may prescribe what shall be done, and require cities and towns to bear the expense to such an extent and in such proportions as it may determine."

As has been said, the assertion of the principle of law as laid down in these two opinions is not to be found in many cases. The principle, however, is none the less firmly established by tacit acceptance on the part of the courts and by practical application in the countless statutes upon which our system of administration is founded.[9] The truth of the matter would seem to be that there has been little occasion for the formulation of a rule of law in opposition to which no constitutional arguments worthy of consideration could be advanced.

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[7](1896) 166 Mass. 347.

[8]p. 359.

[9]See Judge McQuillin's statement of the rule, Municipal Corporations, I, § 234.

On the other hand, there are a few cases of record in which the courts have emphatically declared that the legislature may not compel a municipal corporation to incur a debt or levy a tax for a purpose that is strictly local in character. The most important cases in which this doctrine has been laid down have arisen in Michigan. In the case of *People* v. *The Common Council of Detroit*[10] the opinion of the court turned less upon the doctrine of the right of local selection of local officers, as laid down in the well known case of *People* v. *Hurlbut*[11] than upon the doctrine of lack of authority in the legislature to impose a debt for a local purpose. The act over which the controversy arose was one that vested in a board of park commissioners named by the legislature the absolute power to locate a park for the city and to determine, within a limit set by the enactment, the amount of debt to be incurred by the city for this purpose. While the court relied to a certain extent upon the "general principles" of the Hurlbut case, the opinion, spoken through Judge Cooley, seemed to rest largely upon the application of a principle not adverted to in that case. Thus it was declared:[12]

"The constitutional principle that no person shall be deprived of property without due process of law, applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the state at large, or any portion thereof outside the city limits, are not concerned, the state can no more by a process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to state use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the state. * * *

"We affirm, then, that the city of Detroit has the right to decide for itself upon the purchase of a public park."

Whatever may be thought of the soundness of this doctrine, there can be no question as to the constitutional basis upon which it is rested. It simply asserts that for the legislature to compel a municipal corporation without its own consent to incur a financial obligation for a purpose that is of local rather than of state concern is to deprive the corporation of property without due process of law. That the park commissioners in this instance

[10](1873) 28 Mich. 228.

[11](1871) 24 Mich. 44.

[12]pp. 241-2.

were state appointees was a matter of no importance, except that this fact enabled the court to demonstrate without difficulty that the city had not, through the action either of its inhabitants or of its corporate authorities, acquiesced in the burden that was sought to be imposed. It is to be noted that it would have been sufficient had the court rested its argument against the validity of the statute in question—an argument which was reaffirmed a year later in another case[13] touching the authority of these same commissioners—wholly upon the pertinent parts of the opinions expressed in the Hurlbut case, where it was held that a specific provision of the state constitution prevented the legislature from depriving a municipal corporation of the right to select its own local officers. But the court chose to rest its argument in the park commission cases upon the broader ground indicated.

In a single Kentucky case—*City of Lexington* v. *Thompson*[13a]—the supreme court of that state applied a rule of law, if such indeed it can be termed, which was, in effect at least, somewhat similar to that laid down upon this subject by the Michigan court. Wholly in the absence of any provision of the state constitution in point, the court in this case refused to sustain a statute of the legislature which increased the salaries of firemen in certain cities of the state. The only grounds advanced in support of this judgment of invalidity were contained in the following utterance:

"The act in question does not undertake to deprive the local authorities of the power of appointment or selection of the fire commissioners, [such power being expressly reserved to the local authorities by § 160 of the constitution], but only to regulate and fix the salaries of the officers. * * * If such a power is governmental, it is governmental also to fix the wages of every employe of every city, of whatever class. There were cities and towns before the Constitution was adopted. At the date of its adoption they were managing their own little local affairs. They were employing and paying the members of their fire departments, as in times gone by they had managed their own volunteer fire departments. The makers of the organic law—the voters whose ballots operated to enact it—voted for it with these facts before them, and they limited the time which might be devoted to legislation to 60 days in each two years. Is it conceivable that they expected or intended to permit the Legislature to take charge of the petty salaries of every hamlet in the State?"

It is difficult if not impossible to determine here what constitutional principle or principles the court had in mind. Briefly

[13] People *v.* Mayor of Detroit (1874) 29 Mich. 343.

[13a] (1902) 113 Ky. 540.

analyzed, it would seem that the opinion thus expressed contained several curious points of view. In the first place, it declared that the power to enact such a law is not "governmental." Just why it is not governmental does not appear; nor did the court apparently show any hesitation or reluctance in asserting this new and somewhat strange doctrine of judicial competence—the authority to throw out of court an act which, in the view of the judges, was not an exercise of "governmental" power. In the second place, the view of the court seemed to be that, since cities and towns exercised this power independently of the legislature prior to the adoption of the constitution, this grant of power had by some peculiar alchemy of the law, which the court did not attempt to explain, been transformed into a positive right. On the same principle the legislature would have been inhibited from interfering with any power which any city had exercised before the adoption of the constitution. In the third place, the court gave heed to the fact that the makers of the constitution had limited the sessions of the legislature to 60 days in two years. This was evidence enough that they had not intended that the legislature should enact such a law as this. The intimation contained in this reference to the time limitation imposed upon the legislature—that intimation being apparently that the courts have authority to declare void a law the subject of which, in their opinion, the framers of the constitution could not have intended the legislature to deal with in the limited time at its disposal—is even more astounding than the assertion that the courts are competent to declare void a "non-governmental" law. And finally, it is to be noted that this opinion completely rejects the most fundamental canon of judicial interpretation that is applied in determining the powers of state legislatures under state constitutions. The court did not, in accordance with the doctrine of reserved powers, seek to find in the constitution a prohibition upon this power in the legislature. On the contrary it was declared to be inconceivable that the constitution makers and the voters intended to vest such power in the legislature. "With these facts before them" and knowing that the courts have time out of mind held the legislature to be endowed with all powers not expressly or impliedly denied by the constitution, is it not far more inconceivable that the framers of the constitution failed to incorporate in that instrument the prohibition which the court here, upon the basis of a highly attenuated course of reasoning, cavalierly read into it? And is not this more particularly inconceivable when it is

considered that the framers of the constitution in question devoted especial attention to the subject of cities and incorporated a number of provisions regulating and restraining the powers of the legislature with respect to them?

On the whole, it seems reasonable to class this Kentucky case among the judicial vagaries that are occasionally found in the books. It certainly laid down no clear constitutional principle that is capable of being reduced to expression or of being logically applied. And like the Michigan cases, no attempt was made to rest the judgment of invalidity that was rendered upon any general principle of our constitutional law.

The opinion of Judge McKinstry in the California case of the *People* v. *Lynch*[14] is sometimes cited in support of this same doctrine. In this case, however, the question involved was that of the authority of the legislature to levy upon property within a municipal corporation a special assessment that excluded certain properties benefited. Whatever broad expressions of opinion bearing upon this doctrine may have been made by Judge McKinstry, these expressions did not receive the concurrence of any other member of the court. Nor is it clear but that Judge McKinstry himself was merely construing certain specific provisions of the state constitution.[15] Moreover, in any view of the matter, the statute under consideration did not attempt to impose a debt or obligation upon the municipal corporation itself nor to force the corporation to impose a tax for a *local* purpose. The obligation was sought to be imposed directly upon the taxpayers, and the assessment in question was levied for the purpose of making a street improvement—a function in which the city is ordinarily regarded as acting merely as the agent of the State. This case may, therefore, be set aside as lending no support at all to the doctrine here under discussion.

In another California case—*Bank of Sonoma County* v. *Fairbanks*[16]—there was drawn into question the validity of an act of

[14](1875) 51 Cal. 15.

[15]Art. IV, § 37 of the state constitution declared: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrain their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." The application of Judge McKinstry's line of reasoning to this clause of the constitution is not clear; but apparently much that he had to say was said with a view to showing that this clause operated to restrain the legislature.

[16](1877) 52 Cal. 196.

the legislature authorizing the city of Petaluma to purchase an agricultural park. The court, citing without quotation or argument the case of the *People* v. *Lynch,* declared that "such an act could not, perhaps, have been made mandatory." But this assertion was admittedly dictum, for the court went on to show that such an objection could not be raised in the case at bar for the reason that the legislature had merely authorized the purchase.

Likewise in Illinois a number of cases, beginning with that of the *People* v. *The Mayor of Chicago,*[17] decided in 1869, are often cited in support of the doctrine that the legislature may not compel a municipal corporation to incur a debt for a local purpose without the consent of the inhabitants or of the corporate authorities.[18] It must be admitted that expressions of opinion may be found in some of these cases which, taken in isolation, lend strong color of support to such a doctrine.[19] Nevertheless, it will be found upon examination that in last analysis every one of these cases turned upon the construction and application of a specific provision of the Illinois constitution of 1848.[20] This provision declared that "the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate pur-

[17]51 Ill. 17.

[18]Lovingston *v.* Wider (1870) 53 Ill. 302; Wider *v.* East St. Louis (1870) 55 Ill. 133; Marshall *v.* Silliman (1871) 61 Ill. 218; Wiley *v.* Silliman (1871) 62 Ill. 170; Barnes *v.* Town of Lacon (1877) 84 Ill. 461; Williams *v.* Town of Roberts (1878) 88 Ill. 11; Gaddis *v.* Richland County (1879) 92 Ill. 119; Cairo etc. Ry. *v.* Sparta (1875) 77 Ill. 505.

[19]Thus in the case of the People *v.* The Mayor of Chicago the opinion recited in part (p. 31): "The relators have cited numerous cases as authority in support of the point they make, but they have failed to find a case wherein it has been held that the legislature can compel a city, against its will, to incur a debt by the issue of its bonds for a local improvement. * * * We are not of opinion that the power [of the legislature], such as it is, can be so used as to compel any one of our many cities, to issue bonds against its will, to erect a park or for any other improvement—to force it to create a debt of millions—in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended, that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. * * *

"We fail to perceive any real difference, in principle, in forcing this burden upon the city, and in imposing a like burden, by the direct action of the legislature upon individual property owners within it, for in both cases, the debt, at maturity, must be paid by such holders, while the accruing interest is a constant drain upon their resources.

"No case, amid the multitude which have been cited by the relators, goes to the extent of this, and with our understanding of the constitution, no warrant is found there for such legislation."

[20]Art. IX, § 5.

poses." Briefly put, these cases may be said to have held that this clause operated to restrict the power of the legislature in two directions. First, the "power to assess and collect taxes for corporate purposes" could not be vested in any other than the local corporate authorities; and these the court construed to be "those municipal officers who were either directly elected by the people to be taxed, or appointed in some mode to which they had given their assent." Second, it was held that this clause, since it merely authorized the legislature to *confer* power to assess and collect taxes, must be construed to contain an implied prohibition on the power of the legislature to *compel* such assessment and collection. It may be that this implication was read into the clause in question by a somewhat strained construction of its terms. But certain it is that this was the specific provision of the constitution which the court had under review in these cases. And certain it is that no general constitutional principle, such as the guarantee of due process of law, was invoked, as an objection to mandatory enactments creating local debts. We are not here considering cases arising out of the application of specific provisions of state constitutions. We are considering only such as have laid down a rule of law, which, whether or not the federal constitution was specifically mentioned by the court, may be said to have applied a general federal principle. The Illinois cases cannot by any fair construction be placed in this latter class. Therefore, they lend no support to the doctrine here under discussion.

A few cases from other jurisdictions are also sometimes cited in this connection; but their bearing upon the doctrine in question —if indeed they may be said to have any bearing at all—is so utterly remote that it seems unnecessary to discuss them in detail.[21]

[21]Judge McQuillin (Municipal Corporations, I, p. 532) declares: "Whether the state may impose a debt upon a municipal corporation for a purely local purpose is usually but not always, answered in the negative." In support of this assertion he cites: (1) Bank of Sonoma County *v.* Fairbanks (1877) 52 Cal. 196, where, as indicated above, the part of the opinion referred to is merely dictum; (2) the Illinois cases, which, as indicated above, turned largely if not wholly upon the application of a specific constitutional provision; (3) People *v.* Detroit (1873) 28 Mich. 228, which is eminently in point; (4) Helena Water Co. *v.* Steele (1897) 20 Mont. 1, which, like the Illinois cases, turned largely upon the application of a specific constitutional provision, although the court quoted *in extenso* and with approval from the Michigan park commission case; (this case is also cited by Dillon in support of this doctrine, Municipal Corporations (5th ed.) I, § 119, n.); (5) People *v.* Batchellor (1873) 53 N. Y. 128, which upon the basis of a somewhat nebulous course of reasoning held that, while the legislature might authorize, it might not

In fact, it is perhaps very nearly true to say that Michigan is the only State in which the courts have declared, upon any general principle of constitutional law, that the legislature is incompetent to compel a municipal corporation to incur a debt or impose a tax for a strictly local purpose.

Over against this doctrine of the Michigan courts may be placed a few cases at least in which the doctrine has been flatly repudiated. Thus in the case of *Baltimore* v. *Reitz*[22] the court was called upon to consider the validity of a statute which, among other things, made it mandatory for the city to acquire certain

compel a municipal corporation to subscribe to the stock of a railway corporation; that the court, in declaring that the legislature was incompetent to compel a municipal corporation to enter into contract "when the purpose is private" did not refer to a *local* purpose is manifest, for no one has ever considered that a railroad was a matter of local as distinguished from state concern; (6) Duanesburgh *v.* Jenkins (1874) 57 N. Y. 177, in which a court of concurrent jurisdiction with the Court of Appeals expressly repudiated even the doctrine of the Batchellor case; (Horton *v.* Town of Thompson (1878) 71 N. Y. 513 might have been cited as reaffirming the unrelated and certainly highly questionable doctrine of the Batchellor case); (7) Atkins *v.* Town of Randolph (1858) 31 Vt. 226, which did not involve the authority of the legislature to impose a debt for a *local* purpose, for it is clear that whatever administrative agency may be necessary for enforcing a state-wide statute regulating the sale of liquors could not be called a matter of local concern, nor did the court so refer to it; (8) State *v.* Tappan (1872) 29 Wis. 664, which is wholly out of point for the reason that military bounties are obviously not a matter of local concern, and for the further reason that the opinion turned largely upon the application of a provision of the state constitution requiring uniformity of taxation.

Judge Cooley (Principles of Constitutional Law, 379) cites in support of this doctrine: (1) Howell *v.* Bristol (Ky. 1871) 8 Bush, 493, which invalidated an act that merely *authorized* the council to assess the cost of street improvements in a single street against the property owners, while in other streets such assessments could be made only on a petition of such owners, the ground advanced being that this was inequality of taxation and deprived the *property owners* of property without due process of law; no question of compelling the city to incur a debt against its will was raised; and in any case streets are not ordinarily regarded as a matter of local, as distinguished from state, concern; (2) Washington Ave. (1871) 69 Pa. St. 352, which likewise contained no expression touching upon the authority of the legislature to impose a debt for a local purpose, but held invalid a statute that laid a special assessment upon individual property owners not in accordance with measurable special benefits on the ground of inequality of taxation; (3) Hasbrouck *v.* Milwaukee (1860) 13 Wis. 42, which involved no question of a mandatory tax for a local purpose, the act under review being not compulsory but permissive, while certainly such a matter as a harbor improvement can scarcely be regarded as primarily local in character.

Judge Dillon (Municipal Corporations (5th ed.) I, § 120) asserts that this doctrine is "in accordance with the weight of judicial expression on the subject." In support of this view he refers generally to cases cited by him under §§ 111-112. An examination of the cases there mentioned discloses no case in point in addition to those already referred to here.

[22](1878) 50 Md. 574.

lands for park purposes. Referring to this requirement the court declared:[23]

"The power of the Legislature, to pass a mandatory law of this character, cannot be doubted, since the decision of *Pumphrey* v. *The Mayor and City Council of Baltimore,* 47 Md., 146. In that case an Act of the Legislature, directing and requiring the Mayor and City Council to acquire and maintain as a public highway a bridge, known as 'Harman's bridge,' was held to be constitutional and valid. The reason and doctrine of this case will equally apply to the acquisition of a public square or park."

In other words, it will be noted, the court either regarded a park to be of the same nature as a public highway, the duty of maintaining which, being a matter of state concern, may be imposed upon the local corporation, or else made no distinction whatever between the authority of the legislature to impose a financial burden for a local purpose and its authority to impose such a burden for a state purpose. In either view—and the opinion does not disclose which was held by the court—the doctrine of this case is wholly irreconcilable with that of the Michigan cases above referred to.

In 1870 the legislature of the State of Pennsylvania passed an act which named the members of a commission vested with authority to construct in the City of Philadelphia a colossal city hall. This commission was empowered to requisition the city council for the funds necessary to carry on this undertaking. In the state constitution of 1873 there was incorporated a clause that was aimed to protect municipal corporations against such legislation as this. But in the case of *Perkins* v. *Slack*[24] the court refused to hold that this provision operated to curtail the powers of this previously constituted commission. Nowhere in the course of the majority opinion was any doubt expressed as to the power of the legislature, in the absence of specific constitutional restriction, to compel the city to incur a debt of this kind; and even Judge Paxson, who, with Judge Sharswood, dissented from the opinion of the majority as to the effect of the provision contained in the subsequently adopted constitution, de-

[23] p. 581. It ought to be said that the act was attacked chiefly upon the ground that it contained more than one subject, and that not clearly expressed in its title. It was also assailed upon the ground that its several parts were conflicting, since in one section it appeared to vest in the mayor and council a discretion as to the acquisition of the lands, while in another section it made this acquisition compulsory.

[24] (1878) 86 Pa. St. 270.

clared:[25] "Whatever we may think of its wisdom, no one at the present day doubts the legality of the Act of the 5th of August, 1870."[26]

Again in the Oregon case of *David* v. *Portland Water Committee*,[27] the legislature had conferred upon a committee designated in the act the authority to issue bonds in the name of the City of Portland for the purchase of property and the construction of a municipal waterworks. The main ground of objection that was raised to this act was, as stated by the court, "that the legislature had no power to compel the authorities to enter into contract to make the improvement, or to authorize the committee to issue bonds in its name, and make it liable for their payment." Said the court in the course of the opinion rendered:[28]

"If the contracts were of a 'private character,' the legislature could not provide that the town should enter into them against its will. In all that class of cases cited by the respondent's counsel, where the authority has been denied, the decisions have been placed upon the ground that the power attempted to be exercised related to a private affair of the corporation. This class of decisions has in some instances undertaken to draw the lines between powers which are governmental in their nature, and those which relate to local convenience for the citizen, and to place those relating to water, gas and public parks, on the *quasi* private side of the corporation; and the respondent's counsel strenuously insist that these subjects *per se* relate to private affairs. I doubt whether such is the rule. * * *

"Public parks, gas, water and sewage in towns and cities may ordinarily be classed as private affairs, but they often become matters of public importance; and when the legislature determines that there is a public necessity for their use in a certain locality, I do not think that they can be designated as mere private affairs. This is a relative question. Take the case at bar. The City of Portland needs a supply of water. It has to be brought from some place outside of the city. The matter is presented to the legislature, and it determines that it is a matter of public necessity; that steps should be taken to insure to the city wholesome water at cheap rates; and can it be claimed that it is a mere private affair, and the legislature had no authority to interfere with it?"

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[25] p. 282.

[26] See also the case of San Francisco *v.* Canavan (1872) 42 Cal. 541, where the authority of the legislature to create a state-appointed commission vested with power to construct a city hall for San Francisco was upheld. Here, however, the commission was not clearly vested with power to saddle a debt upon the city.

[27] (1886) 14 Ore. 98.

[28] pp. 122-124.

Here, it will be noted, the court, referring to certain of the cases which we have had under discussion,[29] seemed to admit that the legislature could not compel a municipal corporation to incur a debt for a local or private affair; and the argument of the court was directed to showing that a waterworks was not always to be classed as such an affair. In answer to this it need only be said that in the vast majority of cases in which this question has been raised in one connection or another, waterworks have been held to be "private or local" rather than "public or governmental." There was certainly nothing that was essentially peculiar about the problem of supplying water to the city of Portland —nothing that enabled the court to differentiate such a function as to this city from the same function as to any other city. It would seem, therefore, that in any view of the matter the court's admission that the legislature could not require a city against its will to enter into contract for a private (or local) purpose was wholly without practical significance. For if the construction and maintenance of waterworks are to be classed among the functions which a city undertakes as an agent of the state government, it is difficult to conceive of any function that would fall within the court's concept of the term "private or local." In view of this fact, it is perhaps not too much to say that this case lends support to the doctrine that the legislature may compel a municipal corporation to incur a debt for a purpose that is commonly at least regarded as primarily local in character.

From this brief review of the limited number of cases on this subject it seems fair to conclude that decisions for and against the doctrine that the legislature may not impose upon a municipal corporation a debt for a local purpose are about equally divided. It is worthy of remark, however, that so eminent an authority as Judge Dillon has unqualifiedly endorsed the doctrine of the Michigan park commission cases.[30] Some further examination, therefore, of the reasonableness of this doctrine and some inquiry into the effect which its application would have upon the

[29]Such as the Michigan and Illinois cases, and especially to Atkins *v.* Randolph (1858) 31 Vt. 226, which can scarcely be construed to have been in point. See note 21, *supra.*

[30]Municipal Corporations (5th ed.) I, § 120. He says: "*The judgment of this able court in the Detroit Park Case,* as well as the argument of the eminent judge in the opinion by which it is supported, is, under the facts, as applied to a strictly local park, in the author's judgment not only sound, but it is in accordance with the weight of judicial expression on the subject." As to the "weight of judicial expression," see comment on this assertion in note 21, *supra.*

relation subsisting between the city and the State appear to be not unwarranted.

In the first place, then, this doctrine declares that the municipal corporation itself is by laws of this character deprived of property without due process of law. Let it be noted, however, that, where the law merely compels the corporation to impose a tax for a specific local purpose, the corporation becomes possessed of the property in question—namely, the fund accruing from the collection of the tax—only under the authority of the same law by which it is asserted that it is deprived of property without due process. In the absence of the law, or at least of a law *authorizing* the tax, the corporation could not take possession of the property at all. Is not this strange doctrine? Can it be asserted that a law which vests in a person authority to acquire title to property, which title, in the absence of such law, he could not have acquired at all because of want of legal capacity, deprives him at the same moment of that property without due process of law, because, forsooth, a condition or limitation as to his use of the property is incorporated into the law? Can a person be deprived of property which he does not possess prior to the act of deprivation?

And even if it be conceded that a law may create in a person, or authorize him to take, title to property and at the same time operate to deprive him of that property, is it not questionable whether, in any view of the matter, it can be said that here is lack of due process of law? In the case of a law compelling the imposition of a tax for a specific local purpose the municipal corporation becomes possessed of a title to the property in the tax fund which, for lack of a more appropriate term, may perhaps be called "incomplete." By this it is not meant that the title of the corporation is in any sense defective but only that it is subject to a specific, and in this instance a very far-reaching, limitation.

Even in the case of private persons instances of the acquirement of "incomplete" titles to property are by no means unknown. Such, for example, is the title of a person to real property purchased subject to a limitation in regard to the character or use of any building that may be erected upon the land. Such, again, is the title which a trustee accepts to either realty or personalty—a title that is not infrequently subject to many limitations and which is always subject to the condition that it shall be used for the specific benefit of the cestui que trust. The principle

upon which the acquisition of titles to property subject to conditions or limitations is founded is firmly fixed in the law of property and of trusts. Can it be successfully contended that a statute which compels a person to use his property in accordance with such limitations as are clearly expressed in the title which he acquires is an act that deprives him of property without due process of law? Let us suppose, for illustration, that persons have purchased lots in a certain section of a city under a provision expressed in their deeds of conveyance to the effect that only residences shall be erected upon the lots. Let us suppose that the legislature subsequently enacts this limitation into law. Could it be asserted that the legislature thus deprived these lot-owners of property without due process of law?

Now in the case of municipal corporations greater or less "incompleteness" characterizes the title to nearly all the property of which such a corporation is possessed. This is merely to say that a municipal corporation possesses nearly all of its property subject to certain limitations and conditions. As an illustration of this fact reference need be made only to a single limitation that is practically all-pervading. Thus the rule is sometimes laid down that property which a municipal corporation holds in its "private" capacity is subject to either voluntary or involuntary alienation without legislative assent; but that property used for a public or governmental purpose is not so subject to alienation.[31] It is to be remarked, however, that in this class of cases the courts have put an exceedingly narrow construction upon the term "private,"[32] with the result that in any candid view it must be

[31]Goodnow, Municipal Home Rule, 210.

[32]Thus, from the point of view of these cases, parks are regarded as "public" property. State *v.* Woodward (1850) 23 Vt. 92; Brooklyn Park Commissioners *v.* Armstrong (1871) 45 N. Y. 234. So also are taxes or claims for taxes, no matter for what purpose they may have been levied. Egerton *v.* Third Municipality of New Orleans (1846) 1 La. Ann. 435; Brown *v.* Gates (1879) 15 W. Va. 131; Municipality No. 3 *v.* Hart (1851) 6 La. Ann. 570; Peterkin *v.* New Orleans (1875) Fed. Cas. No. 11,026. So also is the part of a piece of land which, though the whole was granted as a site for a court-house, was nevertheless leased for revenue. Police Jury *v.* Foulhouze (1878) 30 La. Ann. 64. So also is land dedicated for use as a city market. State *v.* Tiedemann (1879) 69 Mo. 306; Abercrombie *v.* Ely (1875) 60 Mo. 23. So also are waterworks. New Orleans *v.* Morris (1881) 105 U. S. 600; Huron Water Works Co. *v.* Huron (1895) 7 S. D. 9; Lake County Water & Light Co. *v.* Walsh (1902) 160 Ind. 32. So also is a court-house or jail. Police Jury *v.* Michel (1849) 4 La. Ann. 84. So also are "ground rents to which the legislature had given destination or appropriation, as a portion of the permanent revenue of the city to enable the city to exercise its powers of police and government." New Orleans & C. R. Co. *v.* Municipality No. 1 (1852) 7 La. Ann. 148;

admitted that a municipal corporation is ordinarily possessed of very little property which it may, without legislative sanction, dispose of at will.[33] Indeed, the weight of authority supports

Klein *v.* New Orleans (1878) 99 U. S. 149. So also are hospitals. Davenport *v.* Insurance Co. (1864) 17 Ia. 276.

Recognizing the fact that a municipal corporation ordinarily possesses little, if any, property that may be regarded as strictly "private" in character—that is, property that is not charged with any public trust or use—the courts in a number of cases have flatly declared that a judgment against a municipal corporation may not be executed under the common writ of *fieri facias* upon *any* of the property of such a corporation, but may be satisfied *only* through the process of mandamus compelling the levy and collection of taxes sufficient to discharge the judgment. See Chicago *v.* Hasley (1861) 25 Ill. 485; King *v.* McDrew (1863) 31 Ill. 418; Kinmundy *v.* Mahan (1874) 72 Ill. 462; Cumberland County *v.* Edwards (1875) 76 Ill. 544; City of Morrison *v.* Hinkson (1877) 87 Ill. 587; City of Pekin *v.* McMahon (1895) 154 Ill. 141; Hoopson *v.* Morris (1886) 21 Ill. App. 307; Board of Education *v.* Hoag (1886) 21 Ill. App. 588; Canton *v.* Dewey (1897) 71 Ill. App. 346; Emery County *v.* Burresen (1896) 14 Utah, 328; Gilman *v.* Contra Costa County (1857) 8 Cal. 52; Emeric *v.* Gilman (1858) 10 Cal. 404; Sharp *v.* Contra Costa County (1867) 34 Cal. 284; Alden *v.* County of Alameda (1872) 43 Cal. 270. In other words, the doctrine of these cases is that the property of a municipal corporation is completely immune against involuntary alienation by seizure and a sale upon execution. At least one eminent commentator has asserted that this is the general rule applied. Freeman on Executions (3d ed.) I, § 22. But it seems highly questionable whether this assertion is justified. See cases cited in note 33, *supra.*

[33]It has been held in a few cases that a municipal corporation may, without legislative sanction, dispose of personal property which it possesses in the form of railway or other public service corporation bonds. Shannon *v.* O'Boyle (1875) 51 Ind. 565, extending the doctrine of Commissioners of Tippecanoe County *v.* Reynolds (1873) 44 Ind. 509, where the question of such authority in the legislature was not specifically raised or discussed. The later case referred to such property as the "personal property of the corporation, of a private nature." In Semmes *v.* Columbus (1856) 19 Ga. 471, such authority was upheld under the general charter power of the city to make contracts, but no reference was made to the character of the property. Under the rule laid down in this case the city could apparently alienate any of its property—a doctrine which is absolutely opposed to the weight of authority.

It has been held, also, that a municipal corporation may voluntarily alienate property acquired for a public purpose but not actually so used. Beach *v.* Haynes (1840) 12 Vt. 15; Konrad *v.* Rogers (1888) 70 Wis. 492; Warren County *v.* Patterson (1870) 56 Ill. 111. On like principle a municipal corporation may sell property which has ceased to be used for a public purpose. Kings County Ins. Co. *v.* Stevens (1886) 101 N. Y. 411, where the right to sell property in a closed street, the city being the owner of the fee, was sustained; Ogden City *v.* Water Works & Irrigation Co. (1904) 28 Utah, 25, where the question was of authority to lease abandoned waterworks.

Involuntary alienation through the process of execution upon a judgment has been sustained against property in a market bazaar, which the court distinguished from property in a market for the sale of comestibles on the ground that the latter was established for a governmental purpose under the police power, while the former was established for revenue purposes solely and apparently without legal competence on the part of the city. New Orleans *v.* Morris (1877) Fed. Cas. No. 10,182; *Ibid.* (1877) Fed. Cas. No. 10,183. So. also, in this class of "private" property

the proposition that a municipal corporation may not, without express grant of power from the legislature, even lease to another such property as that which is devoted to the maintenance of a public utility.[34] Reference is here made to this very general limitation upon the title of municipal corporations in their property not for the purpose of discussing it as such, but simply for the purpose of showing that, as to most of its property, such a corporation is not possessed of complete title comparable to the title which private persons hold in most of their property. For among the elements of the ordinary title nothing is more fundamental than the right to transfer and convey such title at will, or to lease the property held under such title.

Now as to the property that a municipal corporation possesses in the form of a fund arisen out of taxes levied for a specific purpose, the limited character of the corporation's title is obvious. It comes into ownership of the property only for a specific purpose. This is the full extent of its title. How can it be contended, then, that a law which requires the corporation to dispose of this property for the only purpose for which it is held deprives the corporation of property without due process of law? The only rights in this property of which the corporation can claim to be deprived by such a law are rights of which the corporation is *not* possessed under its title. Can it be maintained that a person may be deprived without due process of law of something which he does not possess?

for this purpose is, in California, "beach and water lot property" granted by the State for no public purpose but with express authority to sell or lease. Smith *v.* Morse (1852) 2 Cal. 524; Holladay *v.* Frisbie (1860) 15 Cal. 631. So, also, are "amounts due from two of the city street railways as a bonus for privileges granted," on the theory that these funds were "not any portion of the regular revenue of the city," but are the "purchase price of property which the city has sold;" and also the interest of the city in certain sugar-shed warehouses, which the court put in the same category as the market bazaar above mentioned. Hart *v.* New Orleans (C. C. 1882) 12 Fed. 292. So, also, are the bonds of a public utility corporation. New Orleans *v.* Home Ins. Co. (1871) 23 La. Ann. 61. See also Birmingham *v.* Rumsey (1879) 63 Ala. 352, where no specific property was designated as "private" but only the general rule laid down. See also, as containing expressions of opinion on this point, Darlington *v.* The Mayor (1865) 31 N. Y. 164; Leonard *v.* Brooklyn (1877) 71 N. Y. 498; 3 Dillon, Municipal Corporations (5th ed.) § 991.

[34]New Albany Water Works *v.* Louisville Banking Co. (1903) 122 Fed. 776; Ogden City *v.* Bear Lake etc. Water Works Co. (1898) 16 Utah, 440. But see Baily *v.* Philadelphia (1898) 184 Pa. St. 594, where the authority of the city to lease its gas works was sustained. In this case the court expressed strongly the view that the city had this power because the property in its gas works was possessed in its private or business capacity; but this view was expressed as dictum, for the court found that "the right of alienation is given in express words in the charter."

In what has been said above reference has been made especially to those instances in which the law takes the form of compelling the municipal corporation to levy a tax for a local purpose. In some instances, however, the form of the law is such as merely to require the city to enter into contract or incur a debt or make an appropriation for a local purpose. In ultimate analysis all of these statutory forms are identical in effect. If, for example, the legislature passes a law requiring a municipality to enter into a contract or incur a debt, and if the debt in question is large, practical exigencies will ordinarily require the issue of bonds for the purpose. These bonds, except, perhaps, in the case of a revenue-producing enterprise, must be liquidated out of taxes to be levied. In this case the law is practically identical in all respects with a law requiring the imposition of a tax for the purpose in question; and the arguments advanced above in respect to the inapplicability of the principle of due process of law would seem to be equally pertinent. In the case of a revenue-producing enterprise the more usual practice is to pledge the general credit of the corporation for the payment of the interest on, and principal of, the bonds issued; in which case resort may have to be made, and in practice often is made, to the taxing power. On the other hand, if the more modern and exceptional plan is followed of securing the bonds only by a pledge of the net income derived from the enterprise and by a mortgage on the property acquired for this specific purpose, then it is difficult to see how the city itself can be held to be deprived of any property whatever either with or without due process of law. The city has merely been compelled to acquire title to property, and to mortgage this property to those who have voluntarily purchased its bonds. There is no possibility that the city may ever be called upon to expend any amount of its tax funds or other revenue in liquidation of these bonds. It is true that it is forced to part with property to pay the interest and principal, but only with such property as the enterprise itself produces.

In case the debt thus compulsorily imposed by the legislature is small, it may be that it can be met by an appropriation out of current revenue—that is, out of funds possessed by the corporation for general municipal purposes. Or it may be that the law simply mandates the making of an appropriation, such, for example, as the appropriation of a specific salary for an officer whose functions are distinctly local and municipal in character. It may be

somewhat plausibly urged that legislation of this kind certainly deprives the corporation of property which it already possesses; for although it be admitted that the title which a municipal corporation possesses in property in the form of funds for general municipal purposes is subject to certain *limitations,* it may, nevertheless, be argued that the title is *not,* at the time of its acquirement, limited by the mandatory requirement imposed by the subsequently enacted law in question.

Such an argument is plausible but specious. Municipal corporations are, as to the amount of property which they may acquire by taxation, everywhere and at all times limited to the legitimate needs of the corporation in the maintenance of the government. Even where such limitation is not imposed by express statutory provision it would seem that it is imposed by the operation of the principle of no taxation for a private purpose—a principle which, whatever may be its constitutional basis, is now firmly established in the body of our constitutional law. It is not to be supposed that the courts would permit such a corporation to levy and collect taxes in excess of corporate requirements, since the excess funds so acquired, if not used for municipal purposes, could only be hoarded in the treasury or used for purposes of private investment. Neither of these purposes can reasonably be held to be a public purpose.[35] In theory, therefore, even a small additional expenditure required by the legislature necessitates an increase in the tax levy, although in practice this may not be conspicuously apparent for the reason that it is impossible to strike a perfectly exact balance between prospective revenues and prospective expenditures. On the other hand, it may be remarked that in many cities it is comparatively easy to determine the portion of the tax rate that owes its origin to an aggregate of numerous small appropriations that are required by the law. It seems patent, therefore, that there is in principle no material difference whatever between a law that directs the levy of a tax for a local purpose and a law that compels a city to incur a small debt or to make a small appropriation for such a purpose. In any consideration of the constitutional status of statutes of the latter class we are, in consequence, brought back to the same proposition propounded above: Can it be said that a municipal

[35]Sinking funds, of course, stand upon a wholly different basis. So, also, do contingent funds, which, although they may or may not be used, are manifest necessities, and are clearly created for governmental purposes.

corporation is deprived of property without due process of law where the corporation takes possession of the property in question only for the specific purpose designated in the law?

It may be urged, however, that in the cases in which this doctrine has been announced the courts really intended to declare that it was the taxpayers, and not the corporation, who were deprived of their property without due process of law. Certain it is that in the opinion expressed in the Michigan park commission cases it is difficult to ascertain whether the court had in mind the property rights of the corporation or of the taxpayers.[36] But even though it be conceded that reference was made primarily to the taxpayer's right of protection, it is quite impossible to analyze the logic of judicial reasoning upon which the doctrine in question may be sustained. From the taxpayer's viewpoint the tax imposed by such a law is a tax for a public purpose—public, it is true, only as to the locality. It is not contended that the municipal corporation itself, acting under *authorization* instead of under *mandate* of the law, could not levy and collect the tax in question. But, as far as the rights of the taxpayer are concerned, is it not immaterial whether the payment of the tax is required by the State itself or by the municipality under authority conferred by the State? In either case he parts with some of his property to the corporation. In either case the community enjoys the benefit of the expenditure of the fund collected for the local public purpose. It surely cannot reasonably be said that the rule arises out of the fact that the taxpayer individually or the taxpayers as a class have the power, through the medium of the ballot, to prevent the levy of the tax by the corporation but lack this power of prevention where the tax is required by the State. The taxpayer individually may not be a voter at all. Collectively the taxpayers may not constitute a majority of the municipal voters. And there is certainly in the United States no principle established either in constitutional law or in general practice to the effect that a tax may be imposed only with the consent of a majority of the taxpaying class. The difference between the influence of this class over municipal authorities endowed with the taxing power and their influence over state authorities is merely a matter of variable and unmeasurable degree. Can a fundamental rule of law be predicated upon a difference so vague and intangible in character as this? Indeed, it is not easy to

[36] *Supra*, p. 410.

see how the rights of taxpayers are in any wise adversely affected by such legislation. How, then, can it be asserted that a tax levied by one public authority—the State—deprives them of property without due process of law, although the same tax levied by another public authority—the municipal corporation—would be open to no constitutional objection whatever?

From the foregoing analysis it seems not unreasonable to conclude that, whether we consider the property rights of municipal corporations or of the municipal taxpayers, the doctrine laid down in the Michigan cases and sanctioned by Judge Dillon certainly rests upon a somewhat strained construction, if not in fact upon a wholly arbitrary application of the constitutional guarantee of due process of law. By this it is not meant to declare that a constitutional restriction forbidding the legislature to *require* a municipal corporation to levy a tax or incur a debt for a local purpose would not in many aspects of the matter be eminently salutary and wise. There is little question but that under such a limitation municipal corporations in the United States would have enjoyed, as in some States they have enjoyed,[37] a degree of protection against legislative interference in their local affairs that is much to be desired—interference that has all too frequently been projected with sinister design. But the desirability of a constitutional limitation is one thing, and its existence by expression or reasonable implication is quite another. When the courts see fit to declare that a definite rule of law is to be found in some broad and elastic provision of the constitution, such as the guarantee of due process of law, but do not deem it necessary to explain the logic of argument by which that principle is derived, the least that can be said is that the principle thus laid down is not entitled to the measure of respect that is commonly accorded to judicial opinions.

Certainly the principle here under review has received little practical application in this country, although, if it had been understood and appreciated, there has been (and still is in many States) an almost limitless field in which it could have been applied. It is true that in respect to the incurrence of the large debts legislative action has usually taken the form of an authorization to the municipal authorities rather than that of command. But in the course of our municipal evolution there have unquestionably

[37]Reference is here made to provisions of certain constitutions which have been construed, in effect, to incorporate the guarantee here under consideration.

been many exceptions to this practice—instances in which state legislatures have compelled municipal corporations without any local consent to undertake large enterprises of a distinctly local character. The burdens thus imposed upon the corporations, whether in the form of compulsory contracts or debts or appropriations or tax levies, have not infrequently aroused local indignation. It is, therefore, little short of astonishing at this late date to assert that there has existed, in the federal constitution since the adoption of the Fourteenth Amendment and in most state constitutions prior to that time a general principle of constitutional law which might have been invoked to defeat all legislation of this character.

So far as relatively small obligations are concerned, such, for example, as the payment of salaries to officers whose duties are primarily local, it is perhaps wholly within the limit of the facts to say that there is no important city of the country that has not at one time or another been compelled by law to make appropriations in satisfaction of such obligations. Surely there is in principle no difference between the authority of the legislature to impose a large debt for a local purpose and its authority to impose a small debt for a like purpose. More especially is the absence of such difference emphasized when it is observed that not infrequently in this or that city the aggregate of small mandatory appropriations has been and still is far from inconsiderable. Indeed, even though attention be restricted only to those activities of the city that are commonly regarded as distinctly local in character, the fact must be recognized that the legislative practice of imposing upon municipal corporations in respect to such matters financial burdens, large or small, in the form of mandatory contracts, debts, or appropriations—all of which necessitate directly or indirectly the levy and collection of taxes—has been well nigh universal in the past and has by no means wholly disappeared in the present. In view of the extent of this practice and of the local resentment to which it has in specific exercise occasionally given rise, the conclusion seems justified that, if there exists in the body of our constitutional law a general rule asserting the incompetence of the legislature under the requirement of due process of law to impose upon municipal corporations a debt for a local purpose, the legal profession and the courts have been inexcusably negligent in allowing so important a rule to lie dormant.

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